No. 84-805

IN THE

Supreme Court of the United States

October Term, 1984

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, Debtor,
Petitioner,

v.

THE CITY OF NEW YORK and STATE OF NEW YORK,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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Questions Presented

1. Whether the court below was correct that Congress did not intend the Bankruptcy Code, 11 U.S.C. § 554(a), which authorizes the abandonment of burdensome property, to abrogate federal, state and local laws governing the disposal of hazardous wastes.

2. Whether a trustee can abandon a hazardous waste facility in contravention of state laws and his obligations under 28 U.S.C. § 959(b) to manage and operate the property according to the requirements of valid state laws.

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ARGUMENT

A. A trustee's right to abandon burdensome property pursuant to 11 U.S.C. § 554(a) is subject to the application of a state's police power regulations.

The trustee sought to abandon, as worthless and burdensome, a waste oil processing and storage facility which contained a substantial quantity of hazardous wastes including polychlorinated biphenyls (PCB's) and flammable liquids.

Section 554(a) of the Bankruptcy Code, 11 U.S.C. § 554 (a), permits a trustee to abandon property of the estate which is burdensome or of inconsequential value to the estate. New York, pursuant to its police powers, regulates the handling, storage and disposal of hazardous waste and prohibits its abandonment.[1]

The question presented to the Court of Appeals was whether Congress intended the trustee's abandonment power under federal law to be unrestricted by public health and safety protections embodied in state law—or, to put it plainly, whether a trustee in bankruptcy can ignore state environmental laws concerning hazardous waste.

After a lengthy review of the bankruptcy laws and the authorities interpreting them, the Court of Appeals concluded that there was in fact no indication of any intent on Congress' part to preempt the states' police powers with the enactment of Section 554(a). In reaching this conclusion, the court reasoned that Section 554(a) was merely a codification of a judge-made rule, without any legislative history or limiting language from which an inference could be drawn as to the trustee's authority to supercede the state's police powers. (Pet. App. A pp. 9a, 15a.)

Moreover, the Court noted that construction of Section 554(a) in a manner which does not require the preemption

1. The New York State Environmental Conservation Law, Section 27-0914 and regulations promulgated thereunder at 6 NYCRR 366.4(e), prohibit the disposal of hazardous wastes contrary to the requirements of state statutes and regulations.

The New York City Administration Code, C19-50 *et seq.* requires the maintenance of an operational fire suppression system and round-the-clock supervision by certified personnel at the facility the trustee sought to abandon.

of states' police powers is consistent with established general principles, holding that:

> where important state laws or general equitable principles protect some public interest, they should not be overridden by federal legislation unless they are inconsistent with explicit congressional intent such that the supremacy clause mandates their supersession by the abandonment power. (Pet. App. A p. 14a.)

It also observed that the bankruptcy scheme, viewed in its entirety, contained clear indications that Congress did not intend the Bankruptcy Code to abrogate the enforcement of state police power regulations. (Pet. App. A pp. 15a and 16a.)

Likewise, the Court of Appeals correctly rejected the trustee's claim that abandonment did not violate the state's hazardous waste laws. Abandonment, the trustee had argued, was merely a ministerial act which divested the trustee of title to the property and revested it in the debtor corporation. (Pet. pp. 15-16.) The Court of Appeals recognized that in reality such an act, which separates hazardous waste from the assets needed to check its destructive potential, was a final disposal of the waste which "clearly contravened applicable law, and did so not merely technically but with severely deleterious implications for the public safety." (Pet. App. A p. 21a.)

B. The decision of the Court of Appeals is not contrary to this Court's rule of construction announced in *NLRB v. Bildisco & Bildisco*, 104 S.Ct. 1188 (1984).

The trustee also advances the argument that the decision of the Court of Appeals is contrary to this Court's rule of construction set forth in *NLRB* v. *Bildisco &*

Bildisco, 104 S.Ct. 1188 (1984). *Bildisco,* however, is not inconsistent with the determination of the Court of Appeals in this matter. *Bildisco* held that the term "executory contract," as used in the Bankruptcy Code, 11 U.S.C. § 365(a), did not exclude collective bargaining agreements.[2] This Court observed that although Section 365(a) contained a number of limitations on the power to reject executory contracts, there was no limitation on rejecting a collective bargaining agreement. *Id.*, 104 S.Ct. at 1194. According to the Court, this "statutory design," when viewed in contrast with another section of the Bankruptcy Code, 11 U.S.C. § 1167, which expressly exempted collective bargaining agreements under the Railway Labor Act from the provisions of Section 365(a), showed that Congress did not intend to exempt collective bargaining agreements under the National Labor Relations Act. *Id.*, 104 S.Ct. at 1194-1195.

The trustee's analogy to *Bildisco* would be more compelling if Section 554(a) contained some comparable limitation on the power to abandon burdensome property, for example, proscribing the trustee's abandonment of radioactive materials and biological agents but making no mention of hazardous waste, or explicitly subjecting the trustee's power to abandon to certain enumerated federal or state statutory schemes but making no reference to the state's public health and safety regulations. That, however, is not the case here.

As shown above, Section 554(a) is merely a codification of a judge-made rule, which comes without any legislative

2. Section 365(a) of the Bankruptcy Code, 11 U.S.C. § 365(a), permits a trustee, with the court's approval, to assume or reject any executory contract of the debtor.

history and without any indication that Congress intended to preempt so fundamental a power as the states' police regulations. What is more, as the court below observed, "if trustees in bankruptcy are permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default." (Pet. App. A p. 22a.) The Court of Appeals properly refused to infer "such a radical change in the nature of local public health and safety regulations—the substitution of governmental action for citizen compliance without an indication that Congress so intended." (Pet. App. A p. 22a.)

C. The construction of Section 554(a) of the Bankruptcy Code advanced by the Court of Appeals does not violate the "takings" clause of the Fifth Amendment.

The Court of Appeals correctly rejected the trustee's argument that compliance with the state's police power regulations would result in an unconstitutional taking of property without just compensation. The court's reasoning in this regard is that

> . . . the state's enforcement of its environmental protection laws cannot be characterized as a taking; rather it is a permissible exercise of the state's regulatory power to promote the public good, under a long line of cases dealing with just that distinction. (Pet. App. A p. 23a, note 11.)

Petitioner's reliance on *United States* v. *Security Industrial Bank,* 459 U.S. 70 (1982), to the contrary is misplaced. In *United States* v. *Security Industrial Bank,* the Supreme

Court reviewed a ruling, by the Tenth Circuit Court of Appeals which declared Section 552(f) of the Bankruptcy Code unconstitutional on the grounds that it retroactively extinguished a lienhold interest in violation of the Fifth Amendment. In reversing this decision, the Supreme Court held that there had been no need for the court below to reach the constitutional issue because a review of Section 552(f) did not reveal any congressional intent that it apply retroactively. In so ruling this Court reiterated the well-established principle directing that courts "first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *Id.*, 459 U.S. at 78. The trustee distorted this principle of construing statutes to avoid constitutional infirmities into a rule that would compel a finding that Congress intended to preempt the states' police powers, even where no such intent was evident. There is, of course, no such rule of judicial legerdemain.

D. The court below was correct in its construction of 28 U.S.C. § 959(b).

The obligations of a trustee in bankruptcy are governed by the Judicial Code as well as by the Bankruptcy Code. 28 U.S.C. § 959(b) requires the trustee to carry out his duties in compliance with state law, stating:

> Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession shall manage and operate the property in his possession as such trustee, receiver or manager *according to the requirements of the valid laws of the State* in which such property is situated, in the same

> manner that the owner or possessor thereof would be bound to do if in possession thereof. 28 U.S.C. § 959(a) (emphasis added).

The court below concluded that

> . . . although [Section 959(b)] is not itself an independent prohibition of the trustee's abandoning property in contravention of state law, it is a clear indication that in general the congressional scheme was not intended to subjugate state and local regulatory laws. (Pet. App. A p. 17a.)

The court correctly rejected petitioner's argument that Section 959(b) governs the trustee's duties only in a reorganization under Chapter 11 rather than a dissolution under Chapter 7. Petitioner's reliance on a brief statement in 2 Moore's *Federal Practice* 66.04[4], was found to be misplaced. The Court of Appeals agreed with Professor Moore's position that state laws regulating distribution of assets must give way to federal bankruptcy laws, but declared, "[i]t does not follow that state police power regulations must also give way." (Pet. App. A p. 18a.)

There are no Court of Appeals decisions which conflict with the interpretation of Section 959(b) by the Third Circuit. In fact, respondents have found no other decisions which interpret Section 959(b) in the context of liquidation as opposed to reorganization. The interpretation of the court below is, of course, consistent with others in the context of reorganization. *E.g., In Re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942); *Gillis* v. *California*, 293 U.S. 62 (1934); *In Re Dolly Madison Industries*, 504 F.2d 499 (3rd Cir. 1974); *In the Matter of Canarico Quarries Inc.*, 466 F. Supp. 1333 (D.P.R. 1979). Thus, there is no need to examine the ruling of the court below.

E. The decision of the court below is consistent with the objectives of the Bankruptcy Code.

Petitioner incorrectly suggests that the opinion of the court below has created a new category of preferences not recognized in the Bankruptcy Code. Rather, the court below concluded that a trustee could not abandon a burdensome asset if the abandonment would violate a state law protecting public health and safety. New York was not arguing for a preferred status as a creditor and the court did not create such a category. The question of reimbursement arose only because the Long Island City facility was abandoned pursuant to the order of the Bankruptcy Court below and New York was compelled to spend its own funds to clean up the abandoned site. This litigation does not involve any claims which might have been owing to New York prior to the abandonment. With respect to such claims, New York would, of course, be an ordinary creditor. In contrast, with respect to clean up costs, New York had no intention of becoming a creditor and acted only because the Bankruptcy Court incorrectly permitted the trustee to abandon the Long Island City facility despite the fact that the abandonment violated federal, state and local laws.

The court below did not in fact reach the question of what, if any, priority New York's expenditures would now have, but rather remanded that question to the Bankruptcy Court. (Pet. App. A p. 25a.) It is therefore premature for this Court to examine that question at this stage of the proceedings.

Finally, petitioner's claim that the ruling of the court below would discourage persons from becoming trustees in bankruptcy is spurious at best. Requiring the assets of

the bankrupt estate to be devoted to cleaning up a hazardous waste site created by or in the possession of the estate should be no more a disincentive to serving as a trustee than any other requirement that there be a distribution of assets among the creditors, as in most liquidations. The court below did not suggest that trustees would be subject to personal sanctions either civilly or criminally because of their responsibility to clean up rather than abandon a hazardous waste site where the estate is the responsible party.[3] The fact that the assets of the estate might be exhausted by the clean up in no way alters the situation. What is more, even if persons who serve as private trustees were unwilling to take over the administrative responsibilities of a hazardous waste site, the United States trustee could be required to do so. *In Re Charles George Land Reclamation Trust,* 30 B.R. 918, 923 (Bkrtcy. 1983).[4]

Conclusion

There is insufficient justification for granting certiorari in this case.

There are no Courts of Appeals decisions which conflict with the decision of the court below. Contrary to petitioner's assertions, the ruling of the court below does not frustrate the objectives of the bankruptcy law, for Congress

3. Of course the trustee would be subject to sanctions for personal misdeeds as with other bankrupt estates. 28 U.S.C. § 959(a).

4. In that case the bankruptcy petition was dismissed, not because of the unwillingness of persons to serve as trustee, but because the court concluded that particularly in light of the likelihood that the trustee would move to abandon the hazardous waste site, the environmental problems could be better addressed in state court. 30 B.R. at 924.

clearly intended that the Bankruptcy Code be enforced in harmony with the police powers of the states.

It is, therefore, respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Dated: New York, New York
December 18, 1984

Respectfully submitted,

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